89-2030 (1)

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

COMMISSIONER OF REVENUE SERVICES OF THE STATE OF CONNECTICUT,
Petitioner,

v.

CALLY CURTIS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTION PRESENTED

Did the Supreme Court of Connecticut err in holding that there were insufficient contacts for purposes of taxation between the respondent and the State of Connecticut to satisfy the nexus requirements of the Due Process and Commerce Clauses of the Constitution, despite the physical presence in Connecticut of the respondent's training films which were rented to Connecticut customers in over two hundred transactions which generated thousands of dollars of rental income during the period at issue?

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The petitioner, Commissioner of Revenue Services of the State of Connecticut, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered on March 27, 1990.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Connecticut is reported at 214 Conn. 292, 572 A.2d 302, and is reprinted in the appendix hereto, p. 1A.

The Memorandum of Decision of the Superior Court of the State of Connecticut was issued on April 4, 1989 and has not been reported. It is reprinted in the appendix hereto, p. 13A.

JURISDICTION

The decision of the Supreme Court of Connecticut, affirming the judgment of the Superior Court of Connecticut, was entered March 27, 1990. This petition is filed within 90 days of this judgment, as allowed by 28 U.S.C. § 2101(C) and U.S. Supreme Court Rule 13.1.

The jurisdiction of this Court to review the judgment of the Supreme Court of the State of Connecticut is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions: U.S. Const. Art. I, § 8; U.S. Const. Amend. XIV, § 1; Conn. Gen. Stat. §§ 12-407(2)(j), 12-408(1), 12-411(1), (2) and (3), 12-421 and 12-422.

The text of said provisions is reproduced in the Appendix in accordance with U.S. Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

This petition arises out of an appeal from a decision of the Commissioner of Revenue Services of the State of Connecticut ("the Commissioner"). The Commissioner had assessed sales and use tax deficiencies due from the respondent for sales and rentals of training films and video tapes to customers in Connecticut.

The parties have stipulated to all the facts relating to these proceedings. There was no testimony presented. Based upon the Stipulation of Facts, App.20A and exhibits, the simple factual background can be summarized as follows. The respondent, Cally Curtis Company, is a California corporation in the business of producing and distributing industrial films and video tapes for personnel training purposes. (Stip. ¶ 3; App. 20A). It sells and leases such films via common carrier and the United States mail to Connecticut customers. (Stip. ¶ 14; App. 22A).

The petitioner conducted an audit of the respondent for the period January 1, 1982 through May 31, 1985. The respondent's transactions in Connecticut during the audit or review period consisted of (1) outright sales, (2) three-day rentals of its films for training purposes, and (3) "preview" rentals. A "preview" rental occurred for a fee so that a customer could decide whether to purchase or rent the film for training purposes. In this type of transaction, Cally Curtis sent the film to the Connecticut customer, who was permitted to use the film for three days solely for evaluation purposes, and then was obligated to return it to Cally Curtis. At all times, Cally Curtis remained the owner of the film. There were approximately 200 rental transactions of both varieties and 100 sales in the state of Connecticut during the audit period. No sales or use tax was paid to the State by the respondent for these transactions.

Because the respondent owned significant tangible personal property in Connecticut in the form of 200 short-term rental films and videos and utilized this property on a regular and ongoing basis, the Commissioner of Revenue Services assessed a tax deficiency against the respondent. (Stip. ¶ 5; App. 21A). Following an appeal of this assessment, the Commissioner reaffirmed his ruling, pursuant to Conn. Gen. Stat. § 12-421.

The respondent appealed the Commissioner's assessment to the Superior Court, under the authority of Conn. Gen. Stat.

§ 12-422 which provides for a *de novo* trial. *Kimberly-Clark Corp. v. Orest T. Dubno, Commissioner of Revenue Services*, 204 Conn. 137, 144, 527 A.2d 679, 682 (1987). The trial court held for the respondent, stating without elaboration, "the presence in Connecticut of Curtis' films which are then being leased to its customers in Connecticut is not the kind of 'property within [the taxing] State . . .' which constitutes a nexus sufficient to satisfy Constitutional requirements." (Memo. of Dec., App. 19A).

On appeal, the petitioner challenged this ruling, arguing that the respondent's ownership and utilization on a regular and ongoing basis of significant tangible personal property in the state satisfied constitutional requirements. The Connecticut Supreme Court disagreed, holding that "the trial court properly ruled that there was an insufficient nexus between Curtis and the State of Connecticut to subject Curtis to the Connecticut use tax pursuant to General Statutes § 12-411." *Id.* at __; App. 10A-11A.

REASONS FOR GRANTING THE WRIT

THE QUESTION OF WHETHER THE OWNERSHIP BY AN OUT-OF-STATE COMPANY OF INCOME-PRODUCING PROPERTY RENTED TO OTHERS FOR USE IN CONNECTICUT FULFILLS THE CONSTITUTIONAL REQUIREMENT OF NEXUS IS AN ISSUE OF VITAL IMPORTANCE TO ALL 45 STATES AND THE DISTRICT OF COLUMBIA WHICH ADMINISTER SALES AND USE TAX LAWS.*

Similar to many other states, the Connecticut Sales and Use Tax Act, Conn. Gen. Stat. § 12-406 *et seq.*, imposes a use tax "on the storage, acceptance, consumption or other use in this state of tangible personal property purchased from any retailer." Conn. Gen. Stat. § 12-411(1). The use tax, although distinct from the sales tax, exists to complement the sales tax which is imposed upon those retailers making sales within the state. Conn. Gen. Stat. § 12-408(1). The use tax was created to insure the equitable diffusion of the tax burden upon both in-state and out-of-state purchases and rentals of personal property where such property is intended to be used in Connecticut. *International Business Machine Corp. v. Brown*, 167 Conn. 123, 128–29, 355 A.2d 236, 239 (1974). *See also Henneford v. Silas Mason Co.*, 300 U.S. 577, 581 (1937).

While the use tax is imposed upon the "person storing, accepting, consuming or otherwise using in this state . . ." the tangible personal property, Conn. Gen. Stat. § 12-411(2), it must be collected by "[e]very retailer engaged in business in this state." Conn. Gen. Stat. § 12-411(3). There is no dispute that the rentals as well as the sales were both taxable transactions under Conn. Gen. Stat. § 12-407(2)(j). The sole question before the Court was whether the State had the constitutional authority to require Cally Curtis to collect and remit the tax.

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*See Resolution of Federation of Tax Administrators (June 13, 1990), App. 29A.

Both parties, as well as the Connecticut courts, have referred to *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and *Miller Brothers Co. v. Maryland*, 347 U.S. 340 (1954), as the precedential underpinning to the resolution of this matter. Those cases address, as does this case, the Commerce Clause issue, with its related due process component, of when a business exhibits sufficient contact with a state as to subject it to the tax laws of that state. As this Court stated in *Miller Brothers*, 347 U.S. at 344–45, "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." It is of vital importance to all states, like Connecticut, which heavily rely on their sales and use tax for revenue to have clear, easily-defined standards. Prior to the ruling in this case, Connecticut and the other states had such standards: the physical presence of property within a state's borders was considered a "definite link" sufficient to subject the owner to the taxing authority of the state.

This Court has never suggested otherwise. In fact, in *National Bellas Hess, supra*, this Court expressly noted the distinction between out-of-state mail order sellers with no property within a state and those with such property, strongly implying that the latter were subject to the taxing authority of the state.

> In order to uphold the power of Illinois to impose use tax burdens on National in this case, we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, *or property within a State*, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business.
>
> * * *
>
> Indeed, it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved.

386 U.S. at 758–59 (emphasis added).

This case involves the very exception noted in *National Bellas Hess* — there was substantial property within the state, property consisting of 200 films and videos which provided rental income to the respondent. Unlike the *National Bellas Hess* transactions, the activities of the respondent in Connecticut were not "commercial transactions . . . exclusively interstate in character." *Id.* Indeed, *National Bellas Hess* is precedent supporting the assessment of the petitioning Commissioner and not a basis for holding it invalid, and the Connecticut Supreme Court opinion thus conflicts with the quoted language.

Nor does *Miller Brothers v. Maryland, supra,* provide a basis for the Connecticut Supreme Court decision. In *Miller Brothers,* this Court did not find sufficient nexus for Maryland to impose its sales and use tax upon a Delaware seller, which occasionally used its trucks to make deliveries in Maryland. Although the trucks were used in the taxing state by the vendor, they were at all times in interstate transit, and thus their use was no different from those trucks used by common carriers also hauling goods in transit over state lines. In both instances, these instruments of interstate commerce could not be the basis for establishing nexus. Miller Brothers did not become a taxpayer of Maryland merely because it chose to use its own trucks and not those of a common carrier.

Where, however, as in the present case, property located within the borders of the taxing state is rented to in-state residents for use in the taxing state, it is no longer in transit but has come to rest. Ownership of the property clearly provides a "definite link" and a "minimum contact" between the owner/lessor and that taxing state and may constitutionally be subjected to the taxing authority of the state.

There are but two other noteworthy cases on this point which have been reported, and the Connecticut Supreme Court decision conflicts with both of them. *Union Oil Co. of California v. State Board of Equalization of California,* 60

Cal.2d 441, 34 Cal. Rptr. 872, 836 P.2d 496 (1963), *cert. denied*, 377 U.S. 404 (1964), and *In the Matter of Heftel Broadcasting, Inc.*, 57 Haw. 175, 554 P.2d 242 (1976), *cert. denied*, 429 U.S. 1073 (1977).

Both of these cases hold that the existence of in-state property is a fair and constitutionally significant contact with a taxing state, which provides such services and benefits as police and fire protection as well as a judiciary available to enforce contracts and licensing agreements.

This Court has held in an analogous situation that the maintaining of personnel in a taxing state creates a sufficient nexus for state tax purposes. This is true even where the work of such in-state personnel is totally unrelated to selling or other activities subject to the sales or use tax. Since the physical existence of personnel in the taxing state is a valid basis for nexus, *see National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), *a fortiorari* the presence of in-state property, which is the direct generator of taxable rental income, provides an even greater foundation for a state to claim the jurisdiction to impose an obligation to collect use tax.

The paucity of decisions which address the issue of property constituting nexus in a taxing state demonstrate that this was a settled area of constitutional and state tax jurisprudence. The Connecticut Court's ruling has undermined one of the pillars supporting a state's power to impose the sales and use tax — the presence of property in the taxing state. Instead of a standard easily understood and applied, this decision injects a difficult and subjective test involving such nebulous factors as the value and size of the property and its duration in the taxing state. Where there was once relative certainty, there now is confusion.

This is particularly distressing to both taxpayers and state tax administrators when sales and use taxes are involved. Such taxes are transactional taxes involving three parties to the transaction, the taxpayer, the purchaser, and the tax authority. The taxpayer is in reality the collector for the state of a consumption tax to be borne ultimately by the

purchaser or, as in this case, the lessee. Both the taxpayer and purchaser/lessee need to know at the time of the transaction if the tax is applicable. This is not the case with income or property taxes where there are just two parties, the taxpayer and the tax authority, either of which can later adjust the tax liability by claiming a refund or making a deficiency assessment.

Not only does the Connecticut Supreme Court decision eliminate the previous clear standard regarding nexus, it also injects an unworkable subjective element into the analysis of this already complex three-party tax scheme. Because of the national importance of this issue, the Court should grant this petition, as it did in *National Geographic* regarding in-state personnel, and establish a workable nexus standard regarding in-state property.

CONCLUSION

For the foregoing reasons, the petitioner respectfully submits that this petition should be granted and a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Connecticut.

Respectfully submitted,

Petitioner

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CALLY CURTIS COMPANY *v.* JOHN G. GROPPO, COMMISSIONER OF REVENUE SERVICES (13733)

PETERS, C. J., HEALEY, SHEA, CALLAHAN, GLASS, COVELLO and HULL, Js.

The plaintiff C Co., a California corporation, appealed to the trial court from an assessment by the defendant commissioner of revenue services of sales and use taxes on its rentals and sales of industrial training films to customers in this state. The trial court sustained C Co.'s appeal on the ground that there was an insufficient nexus between C Co. and this state to satisfy the due process and interstate commerce requirements of the federal constitution. On the commissioner's appeal, *held* that the trial court properly ruled that the physical presence of C Co.'s films in this state during rental periods was an inadequate nexus to justify the imposition of taxes.

(One justice dissenting)

Argued December 5, 1989—decision released March 27, 1990

Appeal from an assessment of sales and use tax on certain of the plaintiff's personal property, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and tried to the court, *Fracasse, J.*; judgment sustaining the appeal, from which the defendant appealed. *No error.*

Richard K. Greenberg, assistant attorney general, with whom, on the brief, were *Clarine Nardi Riddle*, attorney general, and *Shelagh P. McClure*, assistant attorney general, for the appellant (defendant).

Christopher F. Droney, with whom was *Michael L. Coyle*, for the appellee (plaintiff).

GLASS, J. This is an appeal from a judgment of the Superior Court sustaining an appeal by the plaintiff, Cally Curtis Company (Curtis), from an assessment by the defendant, commissioner of revenue services (commissioner), of Connecticut sales and use tax for the review period of January 1, 1982, through May 31, 1985 (review period). We find no error.

The facts stipulated by the parties may be summarized as follows. Curtis is a California corporation engaged in the business of producing, selling, leasing and distributing industrial films and videotapes (films) for personnel training purposes. In late 1985, the commissioner, acting through his representative, conducted a review of the books and records of Curtis for the period of January 1, 1982, through May 31, 1985. As a result of the review, the commissioner, pursuant to General Statutes § 12-411,[1] assessed a Connecticut use

[1] "[General Statutes] Sec. 12-411. THE USE TAX. (1) Imposition and rate. An excise tax is hereby imposed on the storage, acceptance, consumption or any other use in this state of tangible personal property purchased from any retailer for storage, acceptance, consumption or any other use in this state or the acceptance or receipt of any services constituting a sale in accordance with subdivision (i) of subsection (2) of section 12-407, at the rate of seven and one-half per cent of the sales price of the property or the consideration paid for any such services.

"(2) LIABILITY FOR TAX. Every person storing, accepting, consuming or otherwise using in this state services or tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this state, except that a receipt from a retailer engaged in business in this state or from a retailer who is authorized by the commissioner, under such regulations as he may prescribe, to collect the tax and who is, for the purposes of this chapter relating to the use tax, regarded as a retailer engaged in business in this state, given to the purchaser pursuant to subsection (3) of this section is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

"(3) COLLECTION BY RETAILER. Every retailer engaged in business in this state and making sales of services or of tangible personal property for stor-

tax liability against Curtis in the amount of $5020.40 plus interest and penalty with respect to certain rentals and sales of films by Curtis to customers in Connecticut.

age, acceptance, consumption or any other use in this state, not exempted under this chapter, shall, at the time of making a sale or, if the storage, acceptance, consumption or other use is not then taxable hereunder, at the time the storage, acceptance, consumption or use becomes taxable, collect the use tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the commissioner. For the purpose of uniformity of tax collection by the retailer the tax brackets set forth in subsection (3) of section 12-408 pertaining to the sales tax shall be employed in the computation of the tax imposed by this section.

"(4) TAX AS DEBT. The tax required to be collected by the retailer constitutes a debt owed by the retailer to this state.

"(5) UNLAWFUL ADVERTISING. The provisions of subsection (4) of section 12-408 pertaining to the sales tax apply with equal force to the use tax.

"(6) SEPARATE STATEMENT OF TAX. The tax required to be collected by the retailer from the purchaser shall be displayed separately from the list price, the price advertised in the premises, the marked price, or other price on the sales check or other proof of sales.

"(7) UNLAWFUL ACTS. Any person violating the provisions of subsection (3), (5) or (6) shall be fined five hundred dollars.

"(8) REGISTRATION OF RETAILERS. Every retailer selling services or tangible personal property for storage, acceptance, consumption or any other use in this state shall register with the commissioner and give the name and address of all agents operating in this state, the location of all distribution or sales houses or offices or other places of business in this state and such other information as the commissioner may require.

"(9) PRESUMPTION OF PURCHASE FOR USE; RESALE CERTIFICATE. For the purpose of the proper administration of this chapter and to prevent evasion of the use tax and the duty to collect the use tax, it shall be presumed that services or tangible personal property sold by any person for delivery in this state is sold for storage, acceptance, consumption or other use in this state until the contrary is established. The burden of proving the contrary is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is purchased for resale.

"(10) EFFECT OF CERTIFICATE. The certificate relieves the person selling the services or property from the burden of proof only if taken in good faith from a person who is engaged in the business of selling services or tangible personal property and who holds the permit provided for by section 12-409 and who, at the time of purchasing the services or tangible personal property, intends to sell it in the regular course of business or is unable to ascertain at the time of purchase whether the service or property will be sold or will be used for some other purpose.

During the review period, Curtis was engaged in the sale and rental of its films to customers in Connecticut. None of the rentals exceeded three days. Some of the sales and rentals resulted from preview transactions in which customers were allowed to examine films for three days before deciding whether to purchase or rent them for training purposes.[2] During the review period, the gross receipts for sales, rentals for training purposes and previews to customers in Connecticut were as follows:

"YEAR	PREVIEW	RENTAL	SALES	TOTALS
1982	$1,640.00	$5,162.60	$13,325.95	$20,128.55
1983	$1,240.00	$3,910.00	$ 9,943.60	$15,093.60
1984	$1,680.00	$5,020.00	$16,618.60	$23,318.60
1985	$ 490.00	$2,073.00	$ 5,834.65	$ 8,397.65
	$5,330.00	$15,885.60	$45,722.80	$66,938.40"

"(11) FORM OF CERTIFICATE. The certificate shall be signed by and bear the name and address of the purchaser, shall indicate the number of the permit issued to the purchaser and shall indicate the general character of the service or tangible personal property sold by the purchaser in the regular course of business. The certificate shall be substantially in such form as the commissioner may prescribe.

"(12) LIABILITY OF PURCHASER. (a) If a purchaser who gives a certificate makes any storage or use of the service or property other than retention, demonstration or display while holding it for sale in the regular course of business, the storage or use is taxable as of the time the service or property is first so stored or used.

"(b) Nothwithstanding the provisions of subdivision (a) of this subsection, any storage or use by a certificated air carrier of an aircraft for purposes other than retention, demonstration or display while holding it for sale in the regular course of business shall not be deemed a taxable storage or use by such carrier as of the time the aircraft is first stored or used by such carrier, irrespective of the classification of such aircraft on the balance sheet of such carrier for accounting and tax purposes.

"(13) PRESUMPTION OF PURCHASE FROM RETAILER. It shall be presumed that tangible personal property shipped or brought to this state by the purchaser was purchased from a retailer for storage, use or other consumption in this state."

[2] The parties agree that the following is an accurate description of a typical transaction. If a customer wished to preview a film before deciding whether to purchase or rent it for training purposes, Curtis would provide the cus-

For the review period, Curtis marketed its sales and rentals in Connecticut only through: (a) trade shows held in states other than Connecticut, at which catalogs were distributed to patrons; (b) mailing lists; and (c) referrals. Catalogs were mailed to Connecticut customers identified on mailing lists or by referrals. Curtis did not utilize the services of any (a) salesmen, personnel or independent representatives in or visiting Connecticut, (b) own or rent offices or warehouses, or any inventory, in Connecticut, or (c) advertise by newspaper, radio or television in Connecticut. A Connecticut customer who wished to order a film from Curtis would have had to complete a purchase or rental order for the film and have sent it to Curtis at its California offices for acceptance in California. In addition, all deliveries and returns of films to and from customers in Connecticut, by sale or rental, were made by common carrier or the United States mail. Curtis had no telephone in Connecticut, nor any property in Connecticut other than the films previewed or rented, and Curtis did not visit its customers in Connecticut.

By way of letters dated December 21, 1985, and January 29, 1986, Curtis duly protested and appealed the assessment with the department of revenue services. On May 27, 1986, the commissioner issued a final determination letter in which he ruled that the assessment was proper and, therefore, denied Curtis' appeal. Curtis then appealed the commissioner's final determination to the Superior Court pursuant to General Statutes § 12-422. Before the trial court, Curtis claimed that the commissioner "wrongfully assessed sales or

tomer with a film to preview for a charge. In this transaction, Curtis would send the film to the customer, who would then be permitted to use the film for three days for evaluation purposes, not for training, and the film must then be returned to Curtis. At all times, Curtis remained the owner of the film. If a customer decided to rent or purchase the same film within sixty days, Curtis then deducted the preview charge from the rental or purchase price.

use tax against [it] because it [did] not have the level of contacts or nexus with Connecticut necessary to tax a foreign corporation; and it contends that without such contacts or nexus, the tax assessed against it by the commissioner violates the Due Process and Commerce Clauses." Conversely, the commissioner contended that "personal property within a taxing state is a sufficient nexus between the taxing state and the entity being taxed to satisfy due process; [and] that Curtis is leasing and thus maintaining films and videotapes, which are personal property, within Connecticut." The trial court sustained Curtis' appeal, stating that "the presence in Connecticut of Curtis' films which are then being leased to its customers in Connecticut is not the kind of 'property within [the taxing] State . . .' which constitutes a nexus sufficient to satisfy Constitutional requirements." The commissioner then appealed the judgment of the trial court to the Appellate Court and we thereafter transferred the case to ourselves pursuant to Practice Book § 4023.

On appeal, the commissioner argues that the trial court erred in ruling that there was an insufficient nexus between Curtis and the state of Connecticut to subject Curtis to the Connecticut use tax. We disagree. Not every out-of-state seller can be held liable for obtaining payment for use tax without a constitutional violation occurring. Such a collection burden when placed upon an out-of-state seller triggers due process concerns as well as imposes a restraint upon interstate commerce. See *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 756, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967); *L.L. Bean, Inc.* v. *Department of Revenue*, 516 A.2d 820, 824 (Pa. Cmwlth. 1986). In determining whether a state tax comports with constitutional due process requirements, the United States Supreme Court has stated that the " 'simple but controlling question is whether the state has given any-

thing for which it can ask return.' " *National Bellas Hess, Inc. v. Department of Revenue,* supra, quoting *Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435, 444, 61 S. Ct. 246, 85 L. Ed 267 (1940). In regard to the question of restraint on interstate commerce, the United States Supreme Court has held that " '[s]tate taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys.' " *National Bellas Hess, Inc.* v. *Department of Revenue,* supra, quoting *Freeman* v. *Hewit,* 329 U.S. 249, 253, 67 S. Ct. 274, 91 L. Ed. 265 (1946). Accordingly, when examining the constitutionality of imposing the duty of collection of a use tax upon an out-of-state seller, the relevant legal inquiry is whether there exists " 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' " *National Bellas Hess, Inc.* v. *Department of Revenue,* supra, quoting *Miller Brothers Co.* v. *Maryland,* 347 U.S. 340, 344–45, 74 S. Ct. 535, 98 L. Ed. 744 (1954); see *L.L. Bean, Inc.* v. *Department of Revenue,* supra. The existence of such a link or nexus will thus turn upon the individual facts of each case. See *L.L. Bean, Inc.* v. *Department of Revenue,* supra.

"Case law has established that a sufficient nexus is found to exist where local agents of the seller are present in the taxing state. *Felt & Tarrant Manufacturing Co.* v. *Gallagher,* 306 U.S. 62, 59 S. Ct. 376, 83 L. Ed. 488 (1939); *General Trading Co.* v. *State Tax Commission of the State of Iowa,* 322 U.S. 335, 64 S. Ct. 1028, 88 L. Ed. 1309 (1944). A similar result has been reached where the seller has local retail stores which are present in the taxing state. *Nelson* v. *Sears, Roebuck & Co.,* 312 U.S. 359, 61 S. Ct. 586, 85 L. Ed. 888 (1941) . . . . And in *National Geographic Society* [v. *California Equalization Board,* 430 U.S. 551,

97 S. Ct. 1386, 51 L. Ed. 2d 631 (1977)], the presence in the taxing state of two offices which solicited advertisements and received the benefit of municipal protection (fire, police, etc.) was held a sufficient nexus." *L.L. Bean, Inc.* v. *Department of Revenue,* supra, 824–25.

In *Miller Brothers Co.* v. *Maryland,* supra, however, the United States Supreme Court held that Maryland "could not constitutionally impose upon a Delaware seller an obligation to collect use taxes where the Delaware firm had no retail outlets or sales solicitors in Maryland, despite the presence of advertising in Maryland which resulted in substantial sales and the delivery of goods into Maryland by the seller using its own trucks and drivers." *L.L. Bean, Inc.* v. *Department of Revenue,* supra, 825. Furthermore, in *National Bellas Hess, Inc.* v. *Department of Revenue,* supra, the United States Supreme Court found an insufficient nexus where the only contacts between the seller and the taxing state were through the United States mail or common carrier.

In *National Geographic Society* v. *California Board of Equalization,* supra, the United States Supreme Court stated the following regarding *National Bellas Hess, Inc.:* "Illinois subjected appellant Bellas Hess, a national mail-order house centered in Missouri, to use tax liability based upon mail-order sales to customers in that State. Bellas Hess owned no tangible property in Illinois, had no sales outlets, representatives, telephone listings, or solicitors in that State, and did not advertise there by radio, television, billboards, or newspapers. It communicated with potential customers by mailing catalogues throughout the United States, including Illinois, twice a year and occasionally supplemented this effort by mailing out 'flyers.' All orders for merchandise were mailed to Bellas Hess' Missouri plant, and the goods were sent to customers by mail

or common carrier. *Bellas Hess* held that, constitutionally, the basis for the requisite nexus was not to be found solely in Bellas Hess' mail-order activities in the State. The Court's opinion carefully underscored, however, the 'sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within [the taxing] State, and those [like Bellas Hess] who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business.' [*National Bellas Hess, Inc.* v. *Department of Revenue*, supra, 758.]" Id., 559.

In the present case, the facts are remarkably similar to those of *National Bellas Hess, Inc.* Just as all of Bellas Hess' contacts with Illinois were via the United States mail or common carrier, all of Curtis' contacts with Connecticut were via the United States mail or common carrier. The commissioner argues, however, that *National Bellas Hess, Inc.*, is distinguishable from the instant case by virtue of the fact that, unlike Bellas Hess, Curtis did not merely sell, but rather, also *leased* property (films) in Connecticut. Therefore, the commissioner contends that, since Curtis retained title to the films while they were previewed or leased in Connecticut, Curtis had property in the state, which in turn, constituted a sufficient nexus to the state to subject Curtis to the state's use tax. We disagree.

As to the question of "whether the state has given anything for which it can ask return," under the facts of this case, we discern no significant difference between a sale and a three day preview or lease of the films. See *National Bellas Hess, Inc.* v. *Department of Revenue*, supra; *Freeman* v. *Hewit*, supra; *Wisconsin* v. *J. C. Penny Co.*, supra. The commissioner relies on *Union Oil Co. of California* v. *Board of Equalization*, 60 Cal. 2d 441, 386 P.2d 496, 34 Cal. Rptr. 872 (1963), appeal dismissed, 377 U.S. 404, 84 S. Ct. 1629, 12 L. Ed. 2d 495 (1964), to support his assertion that a suf-

ficient nexus existed.[3] We find the facts of *Union Oil Co. of California*, however, to be inapposite. In *Union Oil Co. of California*, the California Supreme Court held that an out-of-state lessor of two oil tankers to a California lessee was liable for California's use tax because the tankers were physically used within the state. This fact pattern is distinguishable from the present case, however, because, unlike Curtis' films, the out-of-state lessor's property clearly enjoyed benefits bestowed upon it by the local government such as use of harbors, and fire and police protection.

In short, just because Curtis leased instead of sold the films in Connecticut, does not mean that Curtis " 'receiv[ed] benefits from [Connecticut] for which [Connecticut] has the power to exact a price.' " *National Bellas Hess, Inc.* v. *Department of Revenue*, supra, quoting *Nelson* v. *Sears, Roebuck & Co.*, supra, 365. Although Curtis did have property (films) within Connecticut, such contact with Connecticut, like the contact of the appellant's delivery trucks with Maryland in *Miller Brothers Co.* v. *Maryland*, supra, was de minimus, as the films were only in the state for three day periods, and did not benefit from the services of local government.

In conclusion, we hold that the trial court properly ruled that there was an insufficient nexus between Cur-

[3] Furthermore, the commissioner relies upon *In re Heftel Broadcasting Honolulu, Inc.*, 57 Haw. 175, 554 P. 2d 242 (1976), cert. denied, 429 U.S. 1073, 97 S. Ct. 811, 50 L. Ed. 2d 791 (1977), to support his assertion that a sufficient nexus existed. This case, too, is inapposite. In *Heftel*, the Supreme Court of Hawaii upheld an assessment of a privilege tax by the state of Hawaii against taxpayers located out-of-state who licensed films to be shown on television in Hawaii. Specifically, CBS Enterprises, Inc., entered into license agreements under which Hawaii television stations were granted the right to show certain CBS films. In finding an adequate nexus to override the constitutional prohibitions, however, the court held that "physical presence of CBS' films was not the only contact with Hawaii," and also relied on the licensing arrangement for the films as constituting a continuing activity in the state of Hawaii. Id., 182.

tis and the state of Connecticut to subject Curtis to the Connecticut use tax pursuant to General Statutes § 12-411.

There is no error.

In this opinion PETERS, C. J., HEALEY, CALLAHAN, COVELLO and HULL, JS., concurred.

SHEA, J., dissenting. I disagree with the conclusion reached by the majority that there is an insufficient "nexus" between the plaintiff and this state to justify, under the due process clause, the imposition of the duty to collect use taxes on transactions with customers in Connecticut. The fact that the plaintiff owns property in the form of training films in this state from which it receives rental fees of substantial sums is a sufficient relationship, as the commissioner contends. The protection of these films, like all property in this state, through the services of policemen and firemen is a benefit provided to the plaintiff by the state "for which it can ask return." *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444, 61 S. Ct. 246, 85 L. Ed. 267 (1940).

The reliance of the majority opinion on *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967) is misplaced, because the court in that case expressly recognized the "sharp distinction . . . drawn between mail order sellers with retail outlets, solicitors, or *property* within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." (Emphasis added.) Id., 758. This plaintiff does more than communicate with Connecticut customers, because it owns property of substantial value in this state from which it receives rental payments on a continuing basis. This business activity of the plaintiff is plainly distinguishable from the mail order sales con-

sidered in *National Bellas Hess, Inc.*, in which the seller's interest in the item sold terminates on passage of title to the buyer.

Accordingly, I dissent.

NO. 319654	:	SUPERIOR COURT
CALLY CURTIS, CO.	:	JUDICIAL DISTRICT
v.	:	OF HARTFORD
JOHN G. GROPPO, COMMISSIONER OF REVENUE SERVICES	:	MARCH 31, 1989

MEMORANDUM OF DECISION

This is an appeal, pursuant to Connecticut General Statutes § 12-422, from an assessment by the defendant, Commissioner of Revenue Services (Commissioner), of the Connecticut sales and use tax against the plaintiff, Cally Curtin (Curtis) for the period of January 1, 1982 through May 31, 1985.

Curtis, a California corporation, sells and leases industrial films and videotapes, (films) for personnel training purposes, via common carrier and the United States mail.

The parties have stipulated to the following facts:

In late 1985, the Commissioner, acting through his representative, conducted a review of the books and records of Curtis for the period January 1, 1982 through May 31, 1985 (the "Review").

As a result of the Review, the Commissioner assessed a Connecticut Use Tax liability against Curtis in the amount of $5,020.40 plus interest and penalty (the "Assessment") with respect to certain rentals and sales of films to Curtis' customers in Connecticut.

By way of letters dated December 21, 1985 and January 29, 1986, Curtis duly protested and appealed the Assessment with the Department of Revenue Services for the State of Connecticut.

On May 27, 1986, the Commissioner issued a final determination letter in which he ruled that the Assessment was proper and that Curtis' appeal was denied (the "Final Determination").

This action is an appeal from the Final Determination brought pursuant to § 12-422 of the Connecticut General Statutes and it was duly filed in the Superior Court in accordance with the provisions of Connecticut General Statutes § 12-422.

Curtis' sales in Connecticut during the Review Period were by virtue of purchases and three-day rentals of its films for training purposes and previews by Connecticut-based customers. The parties dispute whether a preview is properly characterized as a rental, as the Commissioner contends. However, the parties agree that the following is an accurate description of the transaction. If a customer wishes to preview a film before deciding whether to purchase or rent it for training purposes, Curtis will provide the customer with a film to preview for a charge. In this transaction, Curtis sends the film to the customer, who is permitted to use the film for three days for evaluation purposes (not training) and then must return it to Curtis. At all times, Curtis remains the owner of this film. If a customer decides to rent or purchase the same film title within 60 days, Curtis deducts the preview charge from the rental or purchase price. During the Review Period, the gross receipts for sales, rentals for training purposes, and previews to customers in Connecticut were as follows:

YEAR	PREVIEW	RENTAL	SALES	TOTALS
1982	$1,640.00	$ 5,162.60	$13,325.95	$20,128.55
1983	$1,240.00	$ 3,910.00	$ 9,943.60	$15,093.60
1984	$1,680.00	$ 5,020.00	$16,618.60	$23,318.60
1985	$ 490.00	$ 2,073.00	$ 5,834.65	$ 8,397.65
	$5,330.00	$15,885.60	$45,722.80	$66,938.40

Curtis did not have a certificate of authority from the Secretary of State to transact business in the State of Connecticut during the Review Period.

For the Review Period, Curtis made marketing contacts for sales and rentals in Connecticut only through: (a) trade shows held in states other than Connecticut, at which catalogs were distributed to patrons, (b) mailing lists, and (c) referrals. Catalogues were mailed to Connecticut customers identified on mailing lists or by referrals.

For the Review Period, Curtis did not have any (a) salesman, personnel, or independent representatives in, or visiting, Connecticut; (b) offices or warehouses, owned or rented, nor any inventory, in Connecticut; or (c) advertising by newspaper, radio or television in Connecticut.

A Connecticut customer wishing to order a film from Curtis completes a purchase or rental order for the film and sends it to Curtis at its California offices for acceptance in California.

For the Review Period, all deliveries (and returns) of films to customers in Connecticut, by sales or rental, were made by common carrier or the United States mail.

For the Review Period, Curtis had no property in Connecticut, other than the films rented or sold.

For the Review Period, Curtis had no telephone in Connecticut.

For the Review Period, Curtis did not visit its customers in Connecticut.

"Appeals from administrative agencies exist only under statutory authority." *Connecticut Bank & Trust Co. v. CHRO*, 202 Conn. 150, 154 (1987). "Any taxpayer aggrieved because of any order, decision or disallowance of the commissioner of

revenue services under §§ 12-418, 12-421 or 12-425 may, within one month after service upon the taxpayer of notice of such order, decision, determination or disallowance, take an appeal therefrom to the Superior Court for the judicial district of Hartford-New Britain . . ." Connecticut General Statutes § 422. Curtis is aggrieved by the defendant's final determination of May 27, 1986. The plaintiff's appeal was timely filed on June 26, 1986.

The Commissioner contends that the sale and lease of personnel training films by the plaintiff to its customers in Connecticut via common carrier or the United States mail, are subject to the Connecticut use tax pursuant to Connecticut General Statutes § 12-411.

Curtis contends that the commissioner "wrongfully assessed sales or use tax against [it] "because it does not have the level of contacts or nexus with Connecticut necessary to tax a foreign corporation; and it contends that without such contacts or nexus, the tax assessed against it by the Commissioner violates the Due Process and Commerce Clause.

The Commissioner argues that personal property within a taxing state is a sufficient nexus between the taxing state and the entity being taxed to satisfy due process; he contends that Curtis is leasing and thus maintaining films and videotapes, which are personal property, within Connecticut.

> ". . . For the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar. . . . As to the former, the Court has held that 'State taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys.' . . . And in determining whether a state tax falls within the confines of the

Due Process Clause, the Court has said that the 'simple but controlling question is whether the state has given anything for which it can ask return.' . . . The same principles have been held applicable in determining the power of a State to impose the burdens of collecting use taxes upon interstate sales. Here, too, the Constitution requires 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' . . .

In applying these principles the Court has upheld the power of a State to impose liability upon an out-of-state seller to collect a local use tax in a variety of circumstances. Where the sales were arranged by local agents in the taxing State, we have upheld such power. . . . We have reached the same result where the mail order seller maintained local retail stores. . . . In those situations the out-of-state seller was plainly accorded the protection and services of the taxing State. The case in the Court which represents the furthest constitutional reach to date of a State's power to deputize an out-of-state retailer as its collection agent for a use tax is *Scripto, Inc. v. Carson*, 362 U.S. 207. There we held that Florida could constitutionally impose upon a Georgia seller the duty of collecting a state use tax upon the sale of goods shipped to customers in Florida. In that case the seller had '10 wholesalers, jobbers, or 'salesmen' conducting continuous local solicitation in Florida and forwarding the resulting orders from that State to Atlanta for shipment of the ordered goods.' 362 U.S., at 211.

But the Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail. . . ."

National Bellas Hess v. Dept. of Revenue, 386 U.S. 753, 756-758; *National Geographic v. Cal. Equalization Bd.*, 430 U.S. 551, 556-562.

The facts in *National Bellas Hess v. Dept. of Revenue* are virtually identical to those in the case before this court. *National Bellas Hess* is a mail order house with its principal place of business in Missouri. It is licensed to do business in only that State and in Delaware, where it is incorporated. The Department of Revenue for the State of Illinois required National to collect and pay to the Department the tax imposed by Illinois upon consumers who purchase the company's goods for use within the State.

> " '[National] does not maintain in Illinois any office, distribution house, sales house, warehouse or any other place of business; it does not have in Illinois any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise it sells; it does not own any tangible property, real or personal, in Illinois; it has no telephone listing in Illinois and it has not advertised its merchandise for sale in newspapers, on billboards, or by radio or television in Illinois.'
>
> All of the contacts which National does have with the State are via the United States mail or common carrier."

National Bellas Hess v. Dept. of Revenue, supra, p. 754.

In the case before this court, Curtis is incorporated in California with its office in California. It does not have an office in Connecticut, nor any salespeople here nor does it advertise in Connecticut. Its only contact for sales and rentals in Connecticut is through (a) trade shows in states other than Connecticut at which catalogs are distributed to patrons (b) mailing lists and (c) referrals. Catalogues are mailed to Connecticut customers identified on mailing lists or by referrals.

The Commissioner contends that the case before this court can be distinguished from the Supreme Court holding in *National Bellas Hess, Inc. v. Dept. of Revenue* because Curtis, in addition to selling its films via the U.S. mail, also rents out its films. It contends that the presence of the film in Connecticut provides the necessary nexus between the plaintiff and Connecticut. This claim is rejected.

There is a "sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within [the taxing] State, and those . . . who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *National Geographic v. Cal. Equalization Bd.*, supra, p. 559. Under § 12-407(2)(j) of the General Statutes, rental or leasing of tangible personal property is a "sale". In evaluating the sufficiency of a nexus to meet constitutional requirements, it is significant that there is no showing that a mail order lessor receives a greater advantage of governmental services than does a mail order seller.

Under the facts of this case, the presence in Connecticut of Curtis' films which are then being leased to its customers in Connecticut is not the kind of "property within [the taxing] State . . ." which constitutes a nexus sufficient to satisfy Constitutional requirements.

Accordingly, the appeal is sustained.

/s/ Ronald J. Fracasse

Ronald J. Fracasse, Judge

n/s to J. Haines
4/4/89 E. Blair
KMN S. McClure
Reid & R
Reporter of Judicial Decisions

NO. CV 86-0319654 S	:	SUPERIOR COURT
CALLY CURTIS CO.	:	JUDICIAL DISTRICT OF HARTFORD/
V.	:	NEW BRITAIN AT HARTFORD
JOHN G. GROPPO, COMMISSIONER OF REVENUE SERVICES	:	FEBRUARY 3, 1989

STIPULATION OF FACTS

Plaintiff/Appellant Cally Curtis Co. ("Cally Curtis") and Defendant/Appellee Commissioner of Revenue Services ("Commissioner") hereby stipulates to as true the following facts for the purposes of this litigation. The parties reserve the right to contest the relevance and/or materiality of any of the following facts and to supplement the stipulation with additional evidence at trial:

1. Plaintiff Cally Curtis is a corporation duly organized and existing under the laws of the State of California with its office in Hollywood, California.

2. The Defendant is duly authorized and is acting as the Commissioner of Revenue Services for the State of Connecticut.

3. Cally Curtis is engaged in the business of producing and distributing industrial Films and videotapes for personnel training purposes ("Films"). Cally Curtis sells and rents the Films.

4. In late 1985, the Defendant, acting through his representative, conducted a review of the books and records of Cally Curtis for the period January 1, 1982 through May 31, 1985 (the "Review").

5. As a result of the Review, the Defendant assessed a Connecticut Use Tax liability against Cally Curtis of $5,020.40 plus interest and penalty (the "Assessment") with respect to certain rentals and sales of Films to Curtis' customers in Connecticut. The Assessment is attached and marked Exhibit I.

6. By way of letters dated December 21, 1985 and January 29, 1986, Curtis duly protested and appealed the Assessment with the Department of Revenue Services for the State of Connecticut.

7. On May 27, 1986, the Defendant issued a final determination letter in which Defendant ruled that the Assessment was proper and that Curtis' appeal was denied (the "Final Determination").

8. This action is an appeal from the Final Determination brought pursuant to Section 12-422 of the Connecticut General Statutes and was duly filed in the Superior Court in accordance with the provisions of *Conn. Gen. Stat.* § 12-422.

9. Cally Curtis' sales in Connecticut during the Review Period were by virtue of purchases and three-day rentals of its Films for training purposes and previews by Connecticut-based customers. The parties dispute whether a preview is properly characterized as a rental, as the Defendant contends. However, the parties agree that the following is an accurate description of the transaction. If a customer wishes to preview a Film before deciding whether to purchase or rent it for training purposes, Cally Curtis will provide the customer with a Film to preview for a charge. In this transaction, Cally Curtis sends the Film to the customer, who is permitted to use the Film for three days for evaluation purposes (not training) and then must return it to Cally Curtis. At all times, Cally Curtis remains the owner of this Film. If a customer decides to rent or purchase the same Film title within 60 days, Cally Curtis deducts the preview charge from the rental or

purchase price. During the Review Period, the gross receipts for sales, rentals for training purposes, and previews to customers in Connecticut were as follows:

YEAR	PREVIEW	RENTAL	SALES	TOTALS
1982	$1,640.00	$ 5,162.60	$13,325.95	$20,128.55
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1985	$ 490.00	$ 2,073.00	$ 5,834.65	$ 8,397.65
	$5,330.00	$15,885.60	$45,722.80	$66,938.40

10. Cally Curtis did not have a certificate of authority from the Secretary of State to transact business in the State of Connecticut during the Review Period.

11. For the Review Period, Cally Curtis made marketing contacts for sales and rentals in Connecticut only through: (a) trade shows held in states other than Connecticut, at which catalogs were distributed to patrons, (b) mailing lists, and (c) referrals. Catalogues were mailed to Connecticut customers identified on mailing lists or by referrals.

12. For the Review Period, Cally Curtis did not have any (a) salesmen, personnel, or independent representatives in, or visiting, Connecticut; (b) offices or warehouses, owned or rented, nor any inventory, in Connecticut; or (c) advertising by newspaper, radio or television in Connecticut.

13. A Connecticut customer wishing to order a Film from Cally Curtis completes a purchase or rental order for the Film and sends it to Cally Curtis at its California offices for acceptance in California.

14. For the Review Period, all deliveries (and returns) of Films to customers in Connecticut, by sale or rental, were made by common carrier or the United States mail.

15. For the Review Period, Cally Curtis had no property in Connecticut, other than the Films rented or sold.

16. For the Review Period, Cally Curtis had no telephone in Connecticut.

17. For the Review Period, Cally Curtis did not visit its customers in Connecticut.

18. Attached hereto as Exhibit 2 is a true, genuine and correct copy of the report prepared by the Revenue Examiner who conducted the audit of Cally Curtis which resulted in the Assessment. Schedules A(1) and A(2) summarize gross receipts from sales and rentals of Films to Connecticut customers by month for the Review Period. The total gross receipts from sales and rentals to Connecticut customers during the review period were $66,938.40, which is reflected on Schedule A(2). Pages A-1 through A-12 are the Revenue Examiner's work papers. The work papers list the invoices for each sale and rental of Film to customers in Connecticut by date, name of customer, invoice number and amount paid by the customer to Cally Curtis for the sale or rental. The invoice numbers contain prefixes which identify the transaction as a sale (SL), rental (RN), or preview (PV).

19. Attached hereto as Exhibit 3 is a Cally Curtis catalog used for marketing purposes in 1985.

AGREED AND STIPULATED TO:

PLAINTIFF/APPELLANT

BY: /s/ Christopher F. Droney

CHRISTOPHER F. DRONEY
Reid & Riege, P.C.
One State Street
Hartford, CT 06103
Telephone: (203) 278-1150

DEFENDANT/APPELLEE

BY: /s/ Shelagh P. McClure

SHELAGH McCLURE
Assistant Attorney General
110 Sherman Street
Hartford, CT 06105

Received in Court
2/8/89
UPZa/c

Exhibits to this
Stipulation on file
with Exhibit Office

Conn. Gen. Stat. § 12-407(2)(a), (j), (5):

Definitions. Whenever used in this chapter:

* * *

(2) "Sale" and "selling" mean and include: (a) Any transfer of title, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration; . . . (j) the leasing or rental of tangible personal property of any kind whatsoever, including but not limited to, motor vehicles, linen or towels, machinery or apparatus, office equipment and data processing equipment, provided for purposes of this subdivision and the application of sales and use tax to contracts of lease or rental of tangible personal property, the leasing or rental of any motion picture film by the owner or operator of a motion picture theater for purposes of display at such theater shall not constitute a sale within the meaning of this subsection. Wherever in this chapter reference is made to the sale of tangible personal property or services, it shall be construed to include sales described in this subsection, except as may be specifically provided to the contrary.

* * *

(5) "Use" includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of that property in the regular course of business.

Conn. Gen. Stat. § 12-408:

The sales tax. (1) **Imposition and rate of sales tax.** For the privilege of making any sales as defined in subsection (2) of section 12-407, at retail, in this state for a consideration, a tax is hereby imposed on all retailers at the rate of seven and one-half per cent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail.

Conn. Gen. Stat. § 12-411(1), (2), and (3):

The use tax. (1) **Imposition and rate.** An excise tax is hereby imposed on the storage, acceptance, consumption or any other use in this state of tangible personal property purchased from any retailer for storage, acceptance, consumption or any other use in this state or the acceptance or receipt of any services constituting a sale in accordance with subdivision (i) of subsection (2) of section 12-407, at the rate of seven and one-half per cent of the sales price of the property or the consideration paid for any such services.

(2) **Liability for tax.** Every person storing, accepting, consuming or otherwise using in this state services or tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this state, except that a receipt from a retailer engaged in business in this state or from a retailer who is authorized by the commissioner, under such regulations as he may prescribe, to collect the tax and who is, for the purposes of this chapter relating to the use tax, regarded as a retailer engaged in business in this state, given to the purchaser pursuant to subsection (3) of this section is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

(3) **Collection by retailer.** Every retailer engaged in business in this state and making sales of services or of tangible personal property for storage, acceptance, consumption or any other use in this state, not exempted under this chapter, shall, at the time of making a sale or, if the storage, acceptance, consumption or other use is not then taxable hereunder, at the time the storage, acceptance, consumption or use becomes taxable, collect the use tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the commissioner. For the purpose of uniformity of tax collection by the retailer the tax brackets set forth in subsection (3) of section 12-408 pertaining to the sales tax shall be employed in the computation of the tax imposed by this section.

Conn. Gen. Stat. § 12-421:

Hearing by commissioner. Any taxpayer, having paid any tax as provided by this chapter, aggrieved by the action of the commissioner or his authorized agent in fixing the amount of such tax or in imposing any penalty hereunder, may apply to the commissioner, in writing, within thirty days after the notice of such action is delivered or mailed to him, for a hearing and a correction of the amount of the tax or penalty so fixed, setting forth the reasons why such hearing should be granted and the amount in which such tax should be reduced. The commissioner shall promptly consider each such application and may grant or deny the hearing requested. If the hearing is denied, the applicant shall be notified thereof forthwith; if it is granted, the commissioner shall notify the applicant of the time and place fixed for such hearing. After such hearing the commissioner may make such order in the premises as appears to him just and lawful and shall furnish a copy of such order to the applicant. The commissioner may, by notice in writing at any time within three years after the date when any return of any taxpayer has been due, order a hearing on his own initiative and require the taxpayer or any other individual whom he believes to be in possession of relevant information concerning the taxpayer to appear before him or his authorized agent with any specified books of account, papers or other documents, for examination under oath.

Conn. Gen. Stat. § 12-422:

Appeal. Any taxpayer aggrieved because of any order, decision, determination or disallowance of the commissioner of revenue services under section 12-418, 12-421 or 12-425 may, within one month after service upon the taxpayer of notice of such order, decision, determination or disallowance, take an appeal therefrom to the superior court for the judicial district of Hartford-New Britain*, which shall be accompanied by a citation to the commissioner of revenue services

to appear before said court. Such citation shall be signed by the same authority, and such appeal shall be returnable at the same time and served and returned in the same manner, as is required in case of a summons in a civil action. The authority issuing the citation shall take from the appellant a bond or recognizance to the state of Connecticut, with surety to prosecute the appeal to effect and to comply with the orders and decrees of the court in the premises. Such appeals shall be preferred cases, to be heard, unless cause appears to the contrary, at the first session, by the court or by a committee appointed by it. Said court may grant such relief as may be equitable and, if such tax has been paid prior to the granting of such relief, may order the treasurer to pay the amount of such relief, with interest at the rate of six per cent per annum, to the aggrieved taxpayer. If the appeal has been taken without probable cause, the court may tax double or triple costs, as the case demands; and, upon all such appeals which are denied, costs may be taxed against the appellant at the discretion of the court, but no costs shall be taxed against the state.

FEDERATION OF TAX ADMINISTRATORS
444 North Capitol St., NW. Washington, DC 20001
(202) 624-6890 • FAX (202) 624-7888

Resolution Twenty

WHEREAS, the Connecticut Supreme Court has ruled in *Cally Curtis Company v. John G. Groppo, Commissioner of Revenue Services,* 214 Conn. 292 (1990), that Connecticut is prohibited under *National Bellas Hess* from imposing the obligation to collect and remit its use tax upon an out-of-state mail order retailer, even when the retailer has property in the state, when such property, in the opinion of the court, is not large enough or has not been in the state a sufficient length of time, and by so ruling has created a "de minimus" exception to "property within a State" as that term is used in *National Bellas Hess,* and

WHEREAS, the Connecticut Department of Revenue Services believes that *Cally Curtis* misapplies *National Bellas Hess,* by failing to recognize the sharp distinction drawn in *Bellas Hess* between retailers with outlets, solicitors or property in a state and those whose only contact with customers is by mail or common carrier, and

WHEREAS, the decision broadens the scope of *Bellas Hess* at a time when that case is already being aggressively used to impede states from attempting to collect use taxes through out-of-state mail order retailers, and

WHEREAS, the Connecticut Department of Revenue Services will petition for review of the *Cally Curtis* decision by the Supreme Court of the United States, and

WHEREAS, Connecticut needs and welcomes the support of its sister states in its efforts to appeal the case, now, therefore, be it

Resolved, that the Federation of Tax Administrators will encourage its member states to support the Connecticut Department of Revenue Services in its efforts to secure review of and to overturn *Cally Curtis Company v. John G. Groppo, Commissioner of Revenue Services*, by filing *amicus curiae* briefs in support of Connecticut's petition for a writ of certiorari, and, if said petition is granted, in support of the appeal.

Adopted by a unanimous vote of the membership at the Annual Business Meeting of the Federation of Tax Administrators, Charleston, SC, June 13, 1990

No. 89-2030

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

COMMISSIONER OF REVENUE SERVICES OF THE STATE OF CONNECTICUT,
Petitioner,

v.

CALLY CURTIS COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Supreme Court of Connecticut err in holding that there was an insufficient nexus between Cally Curtis Company and the State of Connecticut to require Cally Curtis Company to collect the Connecticut use tax?

SUPREME COURT RULE 28.1 DISCLOSURE

There is no parent company, subsidiary or affiliate of Respondent Cally Curtis Company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

The Petitioner, Commissioner of Revenue Services ("Commissioner") and Respondent, Cally Curtis Company ("Curtis") stipulated at trial to the following facts. These facts were also incorporated into the decision of the Connecticut Supreme Court (which affirmed the trial court's judgment in favor of Curtis).

1. During the three-year audit period, the total revenues of Curtis for sales, previews and rentals in Connecticut was $66,938.40. Of this amount, $45,722.80 was received for sales.

2. The total amount of use tax sought by the Commissioner for the three-year audit period was $5020.40.

3. Curtis made marketing contacts for Connecticut sales, previews and rentals only through (a) trade shows held in states other than Connecticut, at which catalogs were distributed to patrons, (b) mailing lists, and (c) referrals.

4. Curtis did not have any salesmen, personnel or independent representatives in Connecticut at any time.

5. Curtis did not have any offices, warehouses or inventory in Connecticut.

6. Curtis did not advertise by newspaper, radio or television in Connecticut.

7. A Connecticut customer wishing to order a film from Curtis completed a purchase or rental order and mailed it to Curtis at its California offices for acceptance in California.

8. All deliveries (and returns) of films to customers in Connecticut by sale or rental, were made by common carrier or the United States mail.

9. Curtis had no property in Connecticut other than the films rented or sold.

10. Curtis had no telephone in Connecticut and never visited its customers in Connecticut.

Stipulation of Facts, Appendix to Petition at ¶ 9-17, pages 21A-23A.

The trial court, after applying the tests of *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and *Miller Brothers Co. v. Maryland*, 347 U.S. 340 (1954), held that Curtis lacked sufficient nexus with the State of Connecticut to require collection of the Connecticut use tax. The Connecticut Supreme Court agreed and affirmed.

REASONS FOR DENYING THE WRIT

1. There is no conflict between relevant U.S. Supreme Court decisions and the Connecticut Supreme Court decision in *Cally Curtis Company v. Commissioner of Revenue Services of the State of Connecticut.*

In *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), this Court held that a sufficient nexus must exist between an out-of-state seller and the taxing state for the taxing state to require the seller to collect use tax. That requirement was based on the Commerce Clause and the Fourteenth Amendment Due Process Clause of the United States Constitution. In determining whether sufficient nexus exists, the court is to examine the individual facts of each case. *See, e.g., L.L. Bean, Inc. v. Department of Revenue*, 101 Pa. Commw. 435, 516 A.2d 820 (1986). The requirement of sufficient nexus protects sellers from the onerous burden of collecting use tax for numerous states, municipalities and other taxing entities in which the seller's activities are not significant. The administrative burden would be overwhelming — especially for small sellers — and little or no benefit would be received in exchange by them from the taxing-entity. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. at 756.

In determining whether sufficient nexus exists with the taxing state, this Court has considered the following:

1. employees or representatives working within the taxing state;

2. warehouses, inventory or other property within the taxing state;

3. retail outlets or stores within the taxing state; and

4. advertising by newspaper, radio or television within the taxing state.

See, e.g., National Bellas Hess, Inc. v. Department of Revenue, id., National Geographic Society v. California Equalization Board, 430 U.S. 551 (1977), *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), *Miller Brothers Co. v. Maryland*, 347 U.S. 340 (1954); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941). It is clear from these and other decisions of this Court that the court is to weigh these indicia of nexus and determine whether a "definite link, some minimum connection between a state and the person, property or transaction it seeks to tax" exists. *Miller Brothers Co. v. Maryland*, 347 U.S. at 344–45.

In his Petition, the Commissioner of Revenue Services for the State of Connecticut seeks to have this Court depart from its prior decisions which require a weighing of these indicia of nexus. Rather, the Commissioner argues that the presence of *any* property in the taxing state in and of itself constitutes sufficient nexus to satisfy the Due Process and Commerce Clauses. The reason given is ease of administration. The Commissioner maintains that prior U.S. Supreme Court decisions have held that the presence of any property satisfies the test.

This Court, however, in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 556 (1977), specifically rejected a "slightest presence test" for determining sufficient nexus. It held that indicia of nexus must be weighed and evaluated. The Commerce Clause and Due Process Clause require a thoughtful review of those indicia, not just a "checklist" approach to whether any property has ever been present in the taxing state. *Miller Brothers Co. v. Maryland, supra, National Bellas Hess, Inc. v. Department of Revenue, supra*, and their progeny have also stated that these indicia must be evaluated by the trial court. In these decisions, the test for sufficient nexus is not satisfied by the mere presence of property in the taxing state, without considering its significance.

The Connecticut Supreme Court in *Cally Curtis Company v. Commissioner of Revenue Services* performed a review of the indicia of nexus and concluded that the presence of rented films for brief periods did not constitute sufficient nexus, since all of Curtis' contacts with Connecticut were by U.S. mail or common carrier. No other facts identified by the U.S. Supreme Court as important in determining sufficient nexus were present. The Connecticut Supreme Court decision is consistent with *National Bellas Hess* and *National Geographic Society.* The Petitioner would have this Court depart from these decisions, not the Respondent.

Petitioner also cites *Union Oil Co. of California v. State Board of Equalization of California*, 60 Cal.2d 441, 34 Cal. Rptr. 872, 836 P.2d 496 (1963), *cert. denied*, 377 U.S. 404 (1964), and *In the Matter of Heftel Broadcasting, Inc.*, 57 Haw. 175, 554 P.2d 242 (1976), *cert. denied*, 429 U.S. 1073 (1977), as decisions which conflict with the Connecticut Supreme Court decision in *Cally Curtis Company v. Commissioner, supra.* Petitioner views those two decisions as support for a "slightest presence" test. In *Union Oil*, however, the property involved was two oil tankers. In *Heftel*, the property involved was rights under multi-year licensing agreements concerning television broadcasts. In both cases, the property involved was much more extensive than the films rented by Curtis. There also was no discussion of a "slightest presence" test; rather, the state courts applied the nexus tests of *National Bellas Hess* and *Miller Brothers*, just as the Connecticut courts in *Cally Curtis Company v. Commissioner.*

2. Curtis did not have sufficient nexus with the State of Connecticut.

The only evidence of nexus of Curtis with the State of Connecticut was the following: a portion of its revenues during the three-year audit period was the product of short-term rentals of its films to Connecticut entities.[1] No other indicia

[1] The total revenues from Connecticut during the three-year audit period were $66,938.40; $45,722.80 was attributed to sales and the balance to rentals and previews.

of nexus existed. For example, Cally Curtis had no employees in Connecticut, no retail outlets, no inventory, no Connecticut offices, no Connecticut advertising, no Connecticut telephone and made no visits to Connecticut. All orders, sales and rentals were made and filled through the U.S. mail or common carrier.

In *Miller Brothers Company v. State of Maryland,* 347 U.S. 340 (1954), this Court held that insufficient nexus existed for Maryland to require a Delaware furniture outlet to collect use tax where the outlet advertised extensively in Maryland and delivered furniture in Maryland in its own trucks. The trucking in the taxing state and the extensive advertising were held insufficient to meet the test of sufficient nexus.

The contacts between Curtis and the State of Connecticut were far less extensive than between the Delaware furniture outlet and Maryland in the *Miller Brothers* case. Accordingly, the Connecticut Supreme Court was correct in sustaining the trial court's judgment.

Petitioner seeks to challenge the Connecticut Supreme Court's reliance on *Miller Brothers* by suggesting that the use of Miller Brothers trucks in Maryland in delivering furniture was not "property" in Maryland for the purpose of the test for sufficient nexus. Rather, petitioner argues, those trucks were no different from U.S. mail trucks as "instruments of interstate commerce" and thus should be excluded from the test for sufficient nexus. The short answer is that this Court in *Miller Brothers* specifically considered the trucking activity in applying the test for sufficient nexus. There is no basis in the *Miller Brothers* opinion for concluding that such an exclusion from the test is appropriate. Moreover, extensive trucking or other private transportation of goods is an important factor to consider, especially given the extensive state governmental interest in the regulation of highways and safety.

3. The issue involved is not of "vital importance to all 45 States and the District of Columbia."

Petitioner argues that the issue involved is of "vital importance to all 45 States and the District of Columbia." Petitioner contends that a "slightest presence" approach would ease the administrative burden in deciding which out-of-state sellers are required to collect the use tax. Significantly increased use tax revenues would also result.

Curtis is much different from many mail order sellers, however. First, it had little revenues from Connecticut and the administrative burden on it for collecting use taxes for 45 States and the District of Columbia — as well as municipalities which have their own sales and use tax — would be overwhelming. Second, the narrow issue whether the presence of rental property constitutes sufficient nexus would not impact most large mail order firms which deal exclusively with sales of property. Thus, a decision on the merits would affect few entities.

CONCLUSION

Cally Curtis Company v. Commissioner of Revenue Services of the State of Connecticut is consistent with the relevant decisions of this Court. This Court has also specifically rejected the "slightest presence" test for evaluating the sufficiency of nexus of mail order firms.

Cally Curtis is of limited impact, only affecting small mail order firms which have revenues from mail order rentals.

It is respectfully requested that the petition be denied.

Respondent

Cally Curtis Company

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